

W. J. S. asks the Utah Labor Commission to review the Administrative Law Judge's dismissal without prejudice of Mr. S.'s claim for benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

ISSUE PRESENTED

_____ Should Mr. S.'s claim be dismissed for his failure to cooperate with a medical examination requested by Kearsley Service Center and the Workers Compensation Fund ("Kearsley" hereafter).

BACKGROUND

Mr. S. is a resident of New York. On December 21, 2000, he filed two Applications For Hearing seeking benefits for injuries suffered in two accidents while employed by Kearsley¹. The first occurred on December 26, 1994, and allegedly resulted in a back injury. The second occurred on September 21, 1995, and allegedly resulted in head and neck trauma. Kearsley answered Mr. S.'s Applications by, among other things, denying that Mr. S. had suffered the alleged head and neck injury.

An evidentiary hearing on Mr. S.'s claims was scheduled for September 12, 2001. Mr. S. was deposed on July 10, 2001, in Ogden, Utah. Kearsley then requested that the upcoming evidentiary hearing be postponed or, alternatively, that the record of that hearing be left open so that Kearsley could obtain a psychological evaluation of Mr. S.'s alleged brain injury. The ALJ denied Kearsley's request, noting among other things that it would be unfair to delay adjudication of Mr. S.'s claim.

On the morning of September 11, 2001, Mr. S. was ready to travel to Salt Lake City for his evidentiary hearing, but his flight was canceled due to the terrorist events of September 11. The evidentiary hearing was postponed until November 27, 2001. The ALJ advised Kearsley that it had until the date of the hearing to obtain any additional medical evaluations of Mr. S..

Kearsley arranged to have Mr. S. examined by Dr. Knippa in Long Beach, California on October 2, 2001. However, Mr. S. refused to travel from New York to California by airplane. He also declined to travel by train. Kearsley then sought an Order from the ALJ compelling Mr. S. to travel to Long Beach for the examination. Mr. S. responded that he would consent to be examined in New York, or alternatively, in Utah in conjunction with his hearing date on November 27, 2001. Mr. S. based his refusal to fly on the events of September 11; he claimed that his spinal condition precluded "frequent and multiple" cross-country train trips.

On October 16, 2001, the ALJ specifically instructed Mr. S. to submit to the medical exam

scheduled in Long Beach. The ALJ's Order concluded that "(f)ailure of (Mr. S.) to comply will result in the hearing date being stricken and possible dismissal of (his) claims"

On October 24, 2001, Mr. S. wrote to the ALJ that it was emotionally difficult for him to travel alone. He also mentioned for the first time that his brother and nephew had been murdered in California, and that he did not wish to travel there for that reason. Mr. S. suggested that he undergo an examination in New York, near his residence. Kearsley responded that Mr. S. had already been scheduled for examination in Long Beach on November 7, 2001, with all expenses paid by Kearsley. The ALJ did not modify her previous Order requiring Mr. S. to cooperate with the upcoming examination.

Mr. S. failed to attend the examination in Long Beach scheduled for November 7, 2001. Kearsley immediately asked that Mr. S.'s Applications be dismissed for failure to cooperate with the examination. Mr. S. responded by arguing he should not be required to travel to California. It is noteworthy that, by this time, the ALJ had already considered these arguments and had directly instructed Mr. S. to cooperate with Kearsley's examination in California.

DISCUSSION AND CONCLUSION OF LAW

Section 63-46b-7(1) of the Utah Administrative Procedures Act authorizes administrative agencies such as the Labor Commission to establish rules for "means of discovery adequate to permit the parties to obtain all relevant information necessary to support their claims or defenses." Pursuant to this authority, the Commission has promulgated Rule R602-2-1.H, which provides in material part as follows:

The defendant may also require the applicant to submit to a medical examination by a physician of the defendant's choice. Failure of an applicant to comply with such requests may result in the dismissal of a claim or a delay in the scheduling of a hearing.

There is no question that Mr. S. has failed to comply with Kearsley's attempts to obtain a medical examination by Dr. Knippa. Mr. S. has given a number of different reasons to avoid the examination. While some of those reasons have some degree of merit, nevertheless, the Commission agrees with the ALJ's judgment that they do not justify Mr. S.'s failure to comply with Kearsley's examination request. This is particularly true with respect to Mr. S.'s failure to attend the examination scheduled for November 7, 2001, after the ALJ had considered the parties' respective arguments and ordered Mr. S. to attend the examination.

In light of the foregoing, the Commission concurs with the ALJ's judgment that Mr. S.'s Applications For Hearing should be dismissed without prejudice. Mr. S. can refile his claims, but if he chooses to do so he will once again be expected to cooperate with Kearsley's reasonable discovery and examination requests.

ORDER

The Commission affirms the decision of the ALJ and denies Mr. S.'s motion for review. It is so ordered.

Dated this 30TH day of May, 2002.

R. Lee Ellertson, Commissioner

1. Kearsley is a Utah employer. At the time of both alleged accidents, Mr. S. resided in Utah.